

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

DIRECTV, INC.,

Plaintiff,

v.

Case No. 04-2233-GTV-DJW

BRIAN HESS,

Defendant.

**ORDER**

Pending before the Court is Plaintiff's Motion to Compel (doc. 28). More specifically, Plaintiff seeks to compel Defendant to provide responses to Plaintiff's Interrogatory Nos. 7, 8, 10, 11, 16, 17, 18 and 20 and to execute authorizations served with Plaintiff's first discovery requests. Defendant Hess has not filed a response to Plaintiff's Motion; thus, with the exception of the request to compel execution of authorizations, the Court will grant the motion as unopposed pursuant to D. Kan. Rule 7.4.

**Execution of Authorizations**

In this motion, Plaintiff requests Defendant sign three separate authorizations for release of personally identifiable information and records with regard to Defendant:

- (1) release of financial records;
- (2) release of video and dvd rental history; and
- (3) release of information from cable and satellite television providers.

All three authorizations are generic in nature; in other words, they do not identify to which companies the release ultimately will be directed.

Plaintiff asserts it requested Defendant to execute the referenced authorizations in conjunction with its written discovery requests in order to obtain relevant documents from third parties. The Court, however, finds no basis within Fed. R. Civ. P. 34 to compel a party signature.

“The purpose of Rule 34 is to make relevant and nonprivileged documents and objects in the possession of one party available to the other.”<sup>1</sup> The breadth of Rule 34 extends to all relevant documents, tangible things, and entry upon designated land or other property.<sup>2</sup> Rule 34 requires that the party upon whom the request is served must be in possession, custody, or control of the requested item.<sup>3</sup> Here, it appears the records are documents or tangible items as defined under Rule 34(a) and that Defendant does not have actual possession or custody of the records. Nevertheless, the Court must decide whether Defendant has “control” of the referenced records for purposes of Rule 34.

“[A] party need not have actual possession of documents to be deemed in control of them. A party that has a legal right to obtain certain documents is deemed to have control of the documents.”<sup>4</sup> But “[t]he relationship between the party and the person or entity having actual possession of the document is central in each case.”<sup>5</sup> Here, the relationship between Defendant and the prospective entities to which the authorizations will be sent is not sufficient to establish control at this juncture of the discovery process. Apparently, Plaintiff has not yet attempted to secure copies

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<sup>1</sup>8A C. Wright & A. Miller, Federal Practice and Procedure § 2202, at 356 (2d ed. 1994).

<sup>2</sup>*Id.* § 2206, at 381.

<sup>3</sup>*Clark v. Vega Wholesale, Inc.*, 181 F.R.D. 470, 472 (D. Nev. 1998) (citing *Neal v. Boulder*, 142 F.R.D. 325 (D. Colo. 1992)).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

of the requested documents from the non-party custodian of the records via subpoena. The appropriate procedure to compel a non-party to produce documents is to serve them a subpoena as set forth in Rule 45 of the Federal Rules of Civil Procedure.<sup>6</sup> It is only after the individuals or entities object on grounds of privilege or otherwise fail to produce the documents pursuant to subpoena that the Court will consider a motion requesting (1) the Court compel the entity to produce the documents pursuant to Rule 45; or (2) compel the party to execute appropriate releases pursuant to the Court's general powers to enforce its own orders.

At this juncture, and under the specific circumstances presented, there is no basis under Rule 34 to allow this Court to compel Defendant to sign the release forms as requested.

### **Sanctions**

Plaintiff seeks to recover fees and expenses incurred in connection with this motion to compel. Fed.R.Civ.P. 37(a)(4)(C) provides that "the court may . . . apportion reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Upon review of the circumstances presented, the Court will consider imposing sanctions but, in accordance with federal rule, will allow Defendant an opportunity to be heard on this issue.

Accordingly, it is hereby ordered that Plaintiff's Motion to Compel is

(1) granted as unopposed to the extent that Defendant is deemed to have waived all objections lodged to interrogatories propounded and Defendants shall be required to provide complete responses to Plaintiff's Interrogatory Nos. 7, 8, 10, 11, 16, 17, 18 and 20; and

(2) denied to the extent that Defendant shall not be compelled to execute the referenced authorizations at this time.

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<sup>6</sup>*Id.*

It is further ordered that Defendant shall have ten (11) days from the date of this Order to show cause why the Court should not impose sanctions for his failure to answer interrogatories.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this \_\_\_\_\_ day of February, 2005.

s/ David J. Waxse  
David J. Waxse  
United States Magistrate Judge

cc: All counsel and *pro se* parties